James Fuqua, Donald Baptiste and Black Kettle Corporation, a Limited Partnership d/b/a Black Kettle, Ltd., d/b/a The Drying Shed *and* Hotel, Motel, Restaurant Employees and Bartenders Union Local 19, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO. Case 32-CA-3245

June 19, 1981

DECISION AND ORDER

Upon a charge filed on December 5, 1980, and amended on December 17, 1980, by Hotel, Motel, Restaurant Employees and Bartenders Union Local 19, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, herein called the Union, and duly served on James Fuqua, Donald Baptiste and Black Kettle Corporation, a Limited Partnership d/b/a Black Kettle, Ltd., d/b/a The Drying Shed, herein called Respondent, the General Counsel of the National Labor Relations Board, by the Regional Director for Region 32, issued a complaint on January 7, 1981, against Respondent, alleging that Respondent had engaged in and was engaging in unfair labor practices affecting commerce within the meaning of Section 8(a)(5) and (1) and Section 2(6) and (7) of the National Labor Relations Act, as amended. Copies of the charge and complaint and notice of hearing before an administrative law judge were duly served on the parties to this proceeding.

With respect to the unfair labor practices, the complaint alleges in substance that on September 17, 1980, following a Board election in Case 32-RC-997, the Union was duly certified as the exclusive collective-bargaining representative of Respondent's employees in the unit found appropriate;[1] and that, commencing on or about October 31, 1980, and at all times thereafter, Respondent has refused, and continues to date to refuse, to bargain collectively with the Union as the exclusive bargaining representative, although the Union has requested and is requesting it to do so. On January 14, 1981, Respondent filed its answer to the complaint admitting in part, and denying in part, the allegations in the complaint.

On March 9, 1981, counsel for the General Counsel filed directly with the Board a Motion for Summary Judgment. Subsequently, on March 13, 1981, the Board issued an order transferring the proceeding to the Board and a Notice To Show Cause why the General Counsel's Motion for Summary Judgment should not be granted. Respondent thereafter filed a response to the Notice To Show Cause.

Upon the entire record in this proceeding, the Board makes the following:

Ruling on the Motion for Summary Judgment

In its answer to the complaint, Respondent contends that the Board's certification is invalid because the decision on the bargaining unit was contrary to established case law and precedent and the Regional Director's decision on substantial factual issues is clearly erroneous on the record and that such error constituted substantial prejudice to the rights of Respondent; that the Board should have sustained Respondent's objections to conduct affecting election, or, the alternative, granted a hearing because of the existence of substantial and material issues of fact; and that the Board has never reviewed the transcript upon which the Regional Director erroneously decided the scope of the bargaining unit and the Board has never reviewed the evidence submitted by Respondent to the Regional Director in support of the objections to conduct affecting election.

In her Motion for Summary Judgment, counsel for the General Counsel maintains that Respondent's answer raises no bona fide issue of fact and, in essence, denies only the legal conclusions to be drawn from the factual allegations pleaded in the complaint and admitted in Respondent's answer; that in its affirmative defenses, Respondent contends that the Certification of Representative issue in Case 32-RC-997 is defective, and its objections to the election were erroneously overruled without a hearing; that Respondent has previously raised these assertions and they were considered and rejected by the Board; that Respondent's defenses have been raised at previous stages of the proceeding and may not be relitigated in this proceeding; and that Respondent's answer raises no issue of fact requiring a hearing in this proceeding. We agree with the counsel for the General Counsel.

Our review of the record herein, including Case 32-RC-997, discloses that pursuant to a Decision and Direction of Election issued by the Regional Director for Region 32 an election was conducted in an appropriate unit of Respondent's restaurant employees located in San Jose, California, on June 16, 1980. Of the total number of votes cast, 15 were for, and 11 were against, the Union, with 1 challenged ballot, a number not sufficient to affect the results of the election. Both Respondent and

[1] Official notice is taken of the record in the representation proceeding, Case 32-RC-997, as the term "record" is defined in Secs. 102.68 and 102.69(g) of the Board's Rules and Regulations, Series 8, as amended. See *LTV Electrosystems, Inc.*, 166 NLRB 938 (1967), enfd. 388 F.2d 683 (4th Cir. 1968); *Golden Age Beverage Co.*, 167 NLRB 151 (1967), enfd. 415 F.2d 26 (5th Cir. 1969); *Intertype Co. v. Penello*, 269 F.Supp. 573 (D.C.Va. 1967); *Follett Corp.*, 164 NLRB 378 (1967), enfd. 397 F.2d 91 (7th Cir. 1968); Sec. 9(d) of the NLRA, as amended.

the Union filed objections to the conduct of the election.[2]

On October 1, 1980, Respondent filed a Request for Review of the Regional Director's Supplemental Decision and Certification of Representative. Respondent asserted that the Regional Director improperly departed from official Board precedent; that the Regional Director's Decision was clearly erroneous on the record resulting in substantial prejudice to the rights of Respondent; and that the summary rejection of Respondent's objections by the Regional Director clearly mandates closer scrutiny by the Board and, at the very least, the Regional Director should have directed a hearing.

On or about September 24, 1980, and again on or about October 16, 1980, the Union, by letter, requested that negotiations for a collective-bargaining agreement with Respondent commence as soon as possible. By letter dated October 31, 1980, Respondent stated in pertinent part, "It is the Company's position that the Certification of Representative issued by the National Labor Relations Board is invalid because of substantial and material errors made by the Board both in the representation case and the Company's objections to the conduct affecting the election results. Accordingly, it is the intention of the Company to have this matter reviewed by an appropriate United States Court of Appeals." Thereafter, on December 5, 1980, the Union filed the instant unfair labor practice charge, and an amended charge on December 17, 1980.

We find no merit to Respondent's contention that a hearing is warranted herein inasmuch as it appears that in seeking a hearing Respondent is merely reiterating the issues previously raised and considered in the underlying representation case, including its request for review. The Board has often held that parties do not have an absolute right to a hearing on objections to an election. And, that a moving party is entitled to an evidentiary hearing only upon its presentation of a *prima facie* showing of "substantial and material" issues.[3]

It is well settled that in the absence of newly discovered or previously unavailable evidence or special circumstances a respondent in a proceeding alleging a violation of Section 8(a)(5) is not entitled to relitigate issues which were or could have been litigated in a prior representation proceeding.[4]

All issues raised by Respondent in this proceeding were or could have been litigated in the prior representation proceeding, and Respondent does not offer to adduce at a hearing any newly discovered or previously unavailable evidence, nor does it allege that any special circumstances exist herein which would require the Board to reexamine the decision made in the representation proceeding.[5] We therefore find that Respondent has not raised any issue which is properly litigable in this unfair labor practice proceeding. Accordingly, we grant the Motion for Summary Judgment.

On the basis of the entire record, the Board makes the following:

FINDINGS OF FACT

I. THE BUSINESS OF RESPONDENT

Respondent, a California corporation with its executive office in Campbell, California, has been engaged in the retail sale of food and beverages at its six restaurants located in Northern California. During the past 12 months, Respondent, in the course and conduct of its business operations, derived gross revenues in excess of $500,000. During the same representative period, Respondent purchased and received goods or services valued in excess of $5,000 which originated outside the State of California.

We find, on the basis of the foregoing, that Respondent is, and has been at all times material herein, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act, and that it will effectuate the policies of the Act to assert jurisdiction herein.

II. THE LABOR ORGANIZATION INVOLVED

Hotel, Motel, Restaurant Employees and Bartenders Union Local 19, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

[2] The Union withdrew its objections on September 17, 1980. Respondent's objections asserted that union agents and supporters threatened employees with retaliation if they did not support the Union; that the head waitress is a supervisor and agent of the Union who threatened and coerced employees into supporting the Union; and that the head waitress' presence as a union observer during both sessions of the election, over the objection of Respondent, interfered with and restrained employees in the exercise of their rights. After investigating the issues raised by Respondent's objections, the Regional Director on September 17, 1980, issued his Supplemental Decision and Certification of Representative, in which Respondent's objections were overruled in their entirety and the Union was certified as the exclusive collective-bargaining representative of the employees in the appropriate unit.

[3] *Modine Manufacturing Company*, 203 NLRB 527 (1973).

[4] See *Pittsburgh Plate Glass Co.* v. *N.L.R.B.*, 313 U.S. 146, 162 (1941); Rules and Regulations of the Board, Secs. 102.67(f) and 102.69(c).

[5] Moreover, as previously noted, Respondent's response to the Union's bargaining demand indicated its intention to have the issue of the validity of the Union's certification reviewed by an appropriate United States Court of Appeals.

III. THE UNFAIR LABOR PRACTICES

A. *The Representation Proceeding*

1. The unit

The following employees of Respondent constitute a unit appropriate for collective-bargaining purposes within the meaning of Section 9(b) of the Act:

> All full-time and regular part-time employees of the Employer employed at its Toyon Avenue, San Jose, California facility known as "The Drying Shed"; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

2. The certification

On July 16, 1980, a majority of the employees of Respondent in said unit, in a secret-ballot election conducted under the supervision of the Regional Director for Region 32 designated the Union as their representative for the purpose of collective bargaining with Respondent.

The Union was certified as the collective-bargaining representative of the employees in said unit on September 17, 1980, and the Union continues to be such exclusive representative within the meaning of Section 9(a) of the Act.

B. *The Request To Bargain and Respondent's Refusal*

Commencing on or about September 24, 1980, and at all times thereafter, the Union has requested Respondent to bargain collectively with it as the exclusive collective-bargaining representative of all the employees in the above-described unit. Commencing on or about October 31, 1980, and continuing at all times thereafter to date, Respondent has refused, and continues to refuse, to recognize and bargain with the Union as the exclusive representative for collective bargaining of all employees in said unit.

Accordingly, we find that Respondent has, since and at all times thereafter, refused to bargain collectively with the Union as the exclusive representative of the employees in the appropriate unit, and that, by such refusal, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act.

IV. THE EFFECT OF THE UNFAIR LABOR PRACTICES UPON COMMERCE

The activities of Respondent, set forth in section III, above, occurring in connection with its operations described in section I, above, have a close, intimate, and substantial relationship to trade, traffic, and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

V. THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, we shall order that it cease and desist therefrom, and, upon request, bargain collectively with the Union as the exclusive representative of all employees in the appropriate unit and, if an understanding is reached, embody such understanding in a signed agreement.

In order to insure that the employees in the appropriate unit will be accorded the services of their selected bargaining agent for the period provided by law, we shall construe the initial period of certification as beginning on the date Respondent commences to bargain in good faith with the Union as the recognized bargaining representative in the appropriate unit. See *Mar-Jac Poultry Company, Inc.*, 136 NLRB 785 (1962); *Commerce Company d/b/a Lamar Hotel*, 140 NLRB 226, 229 (1962), enfd. 328 F.2d 600 (5th Cir. 1964), cert. denied 379 U.S. 817; *Burnett Construction Company*, 149 NLRB 1419, 1421 (1964), enfd. 350 F.2d 57 (10th Cir. 1965).

The Board, upon the basis of the foregoing facts and the entire record, makes the following:

CONCLUSIONS OF LAW

1. James Fuqua, Donald Baptiste and Black Kettle Corporation, A Limited Partnership d/b/a Black Kettle, Ltd., d/b/a The Drying Shed is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Hotel, Motel, Restaurant Employees and Bartenders Union Local 19, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. All full-time and regular part-time employees of the Employer employed at its Toyon Avenue, San Jose, California facility known as "The Drying Shed"; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

4. Since September 17, 1980, the above-named labor organization has been and now is the certified and exclusive representative of all employees in the aforesaid appropriate unit for the purpose of collective bargaining within the meaning of Section 9(a) of the Act.

5. By refusing on or about October 31, 1980, and at all times thereafter, to bargain collectively with the above-named labor organization as the exclusive bargaining representative of all the employees of Respondent in the appropriate unit, Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(5) of the Act.

6. By the aforesaid refusal to bargain, Respondent has interfered with, restrained, and coerced, and is interfering with, restraining, and coercing, employees in the exercise of the rights guaranteed them in Section 7 of the Act, and thereby has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act.

7. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders that the Respondent, James Fuqua, Donald Baptiste and Black Kettle Corporation, A Limited Partnership d/b/a Black Kettle, Ltd., d/b/a The Drying Shed, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hotel, Motel, Restaurant Employees and Bartenders Union Local 19, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive bargaining representative of its employees in the following appropriate unit:

> All full-time and regular part-time employees of the Employer employed at its Toyon Avenue, San Jose, California facility known as "The Drying Shed"; excluding office clerical employees, professional employees, guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them in Section 7 of the Act.

2. Take the following affirmative action which the Board finds will effectuate the policies of the Act:

(a) Upon request, bargain with the above-named labor organization as the exclusive representative of all employees in the aforesaid appropriate unit with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement.

(b) Post at The Drying Shed Restaurant on Toyon Avenue in San Jose, California, copies of the attached notice marked "Appendix."[6] Copies of said notice, on forms provided by the Regional Director for Region 32, after being duly signed by Respondent's representative, shall be posted by Respondent immediately upon receipt thereof, and be maintained by it for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director for Region 32, in writing, within 20 days from the date of this Order, what steps have been taken to comply herewith.

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[6] In the event that this Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

WE WILL NOT refuse to bargain collectively concerning rates of pay, wages, hours, and other terms and conditions of employment with Hotel, Motel, Restaurant Employees and Bartenders Union Local 19, Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, as the exclusive representative of the employees in the bargaining unit described below.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, upon request, bargain with the above-named Union, as the exclusive representative of all employees in the bargaining unit described below, with respect to rates of pay, wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody such understanding in a signed agreement. The bargaining unit is:

> All full-time and regular part-time employees of the Employer employed at its Toyon Avenue, San Jose, California facility known as "The Drying Shed"; excluding office

clerical employees, professional employees, guards and supervisors as defined in the Act.

JAMES FUQUA, DONALD BAPTISTE AND BLACK KETTLE CORPORATION, A LIMITED PARTNERSHIP D/B/A BLACK KETTLE, LTD., D/B/A THE DRYING SHED